

REMARKS

This paper is responsive to the Final Office Action dated October 16, 2009 and subsequent Advisory Action of March 2, 2010. All rejections are respectfully traversed and reconsideration is respectfully requested. Several claims have been amended to assure clarity. New evidence and new arguments are submitted herewith meeting the requirement for an RCE submission.

Interview Request

The undersigned again respectfully requests the courtesy of a telephone interview with the Examiner at the Examiner's earliest convenience in order to expedite prosecution and avoid the necessity of appeal. The undersigned has previously left multiple telephone messages for the Examiner, has requested multiple interviews from the Examiner both in telephone messages and in writing. The telephone calls have not been returned and the written requests have been ignored. Since receipt of the Advisory Action, the undersigned has attempted to reach the Examiner by telephone, but has left no message in view of past experience. The undersigned wishes to resolve any matters that might remain after submission of the present response and supporting evidence and can be reached at the telephone number below.

Response to Rejections

All claims were rejected based upon the Blatter reference in combination with the Herley reference of record. Applicant's prior arguments regarding this rejection are incorporated herein by reference, and Applicant stands by those arguments.

The Advisory Action, in regard to the Herley reference states only that Applicant's arguments are "not persuasive". The undersigned submits that the "arguments" which are not deemed persuasive, are not actually arguments but statements of fact that the undersigned cannot find the teachings asserted by the Examiner to be there. The reason they cannot be found, is that in fact they are not there. The undersigned has repeatedly pointed out that this is a technical error in the Examiner's position regarding the teachings of Herley.

Although the undersigned has repeatedly pointed out this clear error, the Examiner has apparently failed to reconsider, since the error is clear and would be apparent upon review of the cited portions of the reference. Hence, Applicant wishes to support his contention regarding the actual teachings of Herley with the enclosed Declaration of Dr. Charles R. Baugh, PhD which fully contradict the assertions of the Examiner. By reference to Attachment A of the Declaration and the Declaration itself, it is clear that Dr. Baugh is an expert who is highly qualified to provide evidence in the form of this Declaration. In view of the clear technical error in interpretation of Herley, the combination of Blatter with Herley fails to meet all claim features and hence the Examiner's rejection based on this combination is clear legal error and *prima facie* obviousness has not been established.

In addition, the Examiner is required to provide an articulated reasoning for making the proposed combination. The Examiner's reasoning is also based on technical error which results in a logical error in his articulated reasoning; and as a result, the combination is further improper.

The above errors will be explained in detail below:

MPEP 2143.03 requires that all claim features must be considered during examination. "All words in a claim must be considered in judging the patentability of that claim against the prior art." *In re Wilson*, 165 USPQ 494, 496 (CCPA 1970). Hence, in order to establish *prima facie* obviousness, the Office must identify each element of the claims in the cited art. By erroneous interpretation of the Herley reference, the Examiner has erred on this count and thus the combination fails to establish *prima facie* obviousness as follows:

The Examiner asserts that Herley discloses "a method and apparatus for partial encryption of content where the same portion of the program is encrypted two or more times" and references figs. 2-5, the abstract, page 1, paragraphs [0010-0013] and [0020-0031] for support of his position. However, Herley has no such teaching. Applicant has repeatedly pointed this out to the Examiner to no avail. The attached declaration of Dr. Baugh makes it clear that the cited portions of Herley in fact have no such teachings. Furthermore, Dr. Baugh affirms that Herley in its entirety fails to teach that which the Examiner asserts is taught. Additionally, Dr. Baugh affirms that Herley fails to even teach duplication of the content as

claimed. In view of this, the Examiner has clearly erred by failure to find each and every claim feature. The Examiner's technical error leads to an erroneous legal conclusion of obviousness. Reconsideration and allowance are respectfully requested at an early date.

It is further noted that in order to establish *prima facie* obviousness, it is the burden of the Office to not only identify each element of the claims in the prior art but further, to provide an explicit analysis as to the reasoning to support a conclusion of obviousness. (See *In re Kahn*, 441 F. 3d 977, 988 (CA Fed. 2006) - "[R]ejections on obviousness grounds cannot be sustained by mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness").

The Examiner has provided such reasoning, but has made further technical error and thereby failed to satisfy the requirement since the articulated reasoning for making the proposed combination of Blatter and Herley is technically flawed. Hence, the combination is inadequate to establish *prima facie* obviousness as asserted due to further technical error on the part of the Examiner.

The Examiner asserts the reasoning for making the combination as follows: "It would have been obvious to one of ordinary skill in the art at the time of the invention to incorporate the teaching of Herley into the system of Blatter to provide additional security to the broadcast content." (emphasis added). However, as noted in Dr. Baugh's declaration, if one provides content where one duplicated portion is encrypted under a first encryption system and another duplicated portion is encrypted under a second encryption system (as called out in the claims – to paraphrase in some cases without intent of imposing further limitations) one does not produce a system that is more cryptographically secure (i.e., "provide additional security to the broadcast content"). One, in fact, produces a system that uses higher bandwidth without increased security and may in fact produce a system that is in fact less cryptographically secure. In view of this clear technical error, the Examiner's articulated reasoning for making the proposed combination is technically erroneous and thus cannot be used as a proper basis for making the combination. Hence, *prima facie* obviousness has again not been properly established.

Further, in view of the possibility of actually reducing the security of Blatter's system while increasing the need for bandwidth, it is submitted that one of ordinary skill in the art would find no motivation in of any sort, absent Applicant's teachings, for making the proposed combination. In fact, one would likely be led in another direction leading to a teaching against making the proposed combination due to the increased need for bandwidth.

Accordingly, for at least the reasons submitted above, the Examiner has made factual technical errors on multiple counts in his attempt to establish a proper case of *prima facie* obviousness. Due to such errors, *prima facie* obviousness has not in fact been established. Reconsideration and allowance are respectfully requested.

Applicant submits the enclosed declaration of Dr. Baugh as expert testimony in this field as evidence of the Examiner's multiple technical errors. In view of this evidence, it is clear that *prima facie* obviousness has not been established. The claims are submitted to be in condition for allowance and such is respectfully requested. The undersigned again requests the courtesy of a telephone call to resolve any outstanding issues and avoid the expense and necessity of appeal. The undersigned may be reached at the telephone number below and is confident that if the Examiner has remaining issues, they can be resolved expeditiously via a telephone conversation.

Prior to concluding this response, Applicant wishes to note that it is possible that the Examiner has a misunderstanding of the claim language. A careful reading of any independent claim with attention to the antecedent basis for the exact terminology used will show that the claims require for example "at least one primary PID that identifies a portion of a program encrypted under a first encryption system" and "at least one shadow PID that identifies a duplicate of the same portion of the program encrypted under a second encryption system". It is believed possible that the Examiner has mistakenly interpreted the claim language to mean that the same content is encrypted multiple times (double encrypted - not duplicated with the duplicates each encrypted under separate encryption as claimed). The present claims have been reviewed carefully and the language of some have been clarified so that there can be no mistake

in this regard. However, such amendments do not change the scope or intended scope of the claims in any manner. Reconsideration and allowance are respectfully requested at an early date.

Concluding Remarks

Applicant believes that the above distinctions between Applicant's claims and the combination of the Blatter and Herley references make it unnecessary to provide further arguments at this point. As such, failure to address each and every argument made by the Patent Office is believed unnecessary at this point. Accordingly, failure to address each and every point made by the Patent Office is not to be considered acquiescence to any such point.

In view of the discussion above, claims 1-51 are in proper condition for allowance. Reconsideration is respectfully requested and notice of allowance for all pending claims is respectfully requested at the earliest possible date.

If any issues remain, the Examiner is again earnestly requested to contact the undersigned to expedite allowance and issue and avoid the necessity and expense of appeal. The undersigned is confident that any remaining issues can be quickly dispensed with by a telephone discussion of the issues, and thereby reduce expense to the Applicant and expedite resolution of the present application.

Respectfully submitted,

/Jerry A. Miller 30779/

Jerry A. Miller

Registration No. 30,779

Dated: 3/11/2010

Please Send Correspondence to:
Miller Patent Services
2500 Dockery Lane
Raleigh, NC 27606
Phone: (919) 816-9981
Fax: (919) 816-9982
Customer Number 24337

Application No.: 10/084,106